UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

McDONALD'S USA, LLC, A JOINT EMPLOYER et al.,

and	**Cases**	**02-CA-093893, et al.**
		04-CA-125567, et al.
FAST FOOD WORKERS COMMITTEE AND		**13-CA-106490, et al.**
SERVICE EMPLOYEES INTERNATIONAL UNION,		**20-CA-132103, el al.**
CTW, CLC, et al.		**25-CA-114819, et al.**
		31-CA-127447, et al.

BRIEF OF PHILADELPHIA RESPONDENT IN SUPPORT OF SPECIAL APPEAL OF MCDONALD'S USA, LLC FROM ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEEMENTS

Dated: August 24, 2018

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I. INTRODUCTION AND SUPPLEMENTAL FACTUAL BACKGROUND

Jo-Dan MadAlisse LTD, LLC, the Philadelphia Respondent in this matter, joins in the Request of McDonald's USA, LLC for Special Permission to Appeal the Administrative Law Judge's Order dated July 17, 2018 Denying Motions to Approve Settlements[1], as well as McDonald's USA, LLC's accompanying Special Appeal, and incorporates the same herein by reference. Jo-Dan MadAlisse LTD, LLC also raises the following supplemental arguments in support of McDonald's USA's appeal.

Jo-Dan Madalisse LTD, LLC is a small family owned business that owns and operates two McDonald's restaurants in north Philadelphia, Pennsylvania. While a union campaign against McDonald's and various franchisees commenced in or about November 2012, it was not until March 2014 that the Pennsylvania Workers Organizing Committee, an arm of the Service Employees International Union, filed the first in a series of unfair labor practice charges against Jo-Dan MadAlisse alleging various violations of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act. Included in the charges was the allegation that McDonald's USA, LLC, the franchisor, was a joint employer of the employees at Jo-Dan MadAlisse's restaurant at 3137 N. Broad Street, Philadelphia, PA. On December 19, 2014, the NLRB issued complaints against McDonald's and 30 of its franchisees, including Jo-Dan MadAlisse. On January 5, 2015, the complaints were transferred to the NLRB's Regional Director in NLRB Region 2. On January 6, 2015, the cases were consolidated before ALJ Esposito.

From the time of the transfer and consolidation of the complaint against Jo-Dan MadAlisse with the complaints filed against the other 29 McDonald's franchisees from across the country (literally from New York to California), Jo-Dan MadAlisse has been embroiled in what is, by all

[1] The Order is attached to McDonald's Appeal Brief as Exhibit 1.

accounts, the largest and longest trial in the history of the National Labor Relations Board. Instead of the brief time it would have taken to resolve the garden variety charges brought against Jo-Dan MadAlisse at a very short trial in Region 4 (or, most likely, settlement of the case before trial), Jo-Dan MadAlisse has been compelled to defend itself in a trial that has spanned more than 150 days of hearings.

As the Administrative Law Judge noted in her Order Denying Motions to Approve Settlement Agreements, in January and February 2015, McDonald's USA and the respondent franchisees filed motions to sever the consolidated case, which the Judge denied by Order dated February 20, 2015 (Order, p. 4). As the Administrative Law Judge also noted in her Order, in October 2016 (after 58 trial days), following submission of a stipulation between all parties, the Court severed the complaints from Regions 13, 20, 25 and 31, and the trial proceeded thereafter only as to the Complaints issued in the Region 2 and 4 cases (Order, p. 6). Although the ALJ cites the series of motions and arguments concerning the consolidation of the Complaints, the motions to sever, and the feasibility of the Case Management Order in an apparent attempt to portray the Respondents as having engaged in frivolous motion practice or other dilatory tactics, the ALJ omitted from her recitation of the procedural history the fact that after denying the motions to sever and various other motions concerning the case management order, it was the ALJ herself who requested the parties to submit such a stipulation to sever the cases after 58 days of trial.[2]

The ALJ also criticized Respondents for objecting to the admission of documents they had produced in response to subpoenas on the basis of a lack of "foundation" or the fact that the witness on the stand was not an "appropriate" witness to "shepherd" the document into evidence, suggesting

[2] The request was made by the ALJ in an off-the-record conference call with counsel for all parties on September 21, 2016 after asking the parties to provide estimates of the number of trial days needed for presentation of their cases (See TR. 8514-8524).

that these objections were frivolous or perhaps lacked any basis in law. These objections however were based on Rules 803(6), 901, and 602 of the Federal Rules of Evidence, which establish foundational prerequisites for the admission of certain documents in order to insure the reliability of the evidence and integrity of the trial process (See F.R.E. 102). These rules were often cited by Respondents as the basis for these routine objections. (See e.g. Tr. 1203, 1406-1407, 1703-1704, 1673-1684).

The case has been vigorously contested, the proceedings have been extraordinarily lengthy, and the record to date consists of over 21,000 transcript pages and over 3,000 exhibits. In anticipation of the conclusion of the trial of the Region 2 and 4 cases, the General Counsel has filed a motion requesting six months to file post-trial briefs. It thus appears unlikely that a decision from this Court would issue before some point in the later part of 2019 if the pending motions to approve the settlement agreements are not granted.

On January 17, 2018, the General Counsel requested a 60-day stay of proceedings to facilitate settlement discussions, and the stay was granted. Although the Charging Parties chose not to participate in the settlement negotiations, Charging Parties nonetheless acknowledged they were fully apprised of the settlement discussions. *See* (Tr. 21201:21-23). During the stay, counsel for the General Counsel, the Charged Franchisees, and McDonald's USA worked diligently toward reaching settlements. The Settlement Agreements that have been submitted for approval are the direct result of those efforts.[3]

[3] The Settlement Agreements are attached to McDonald's Appeal Brief as Exhibits 20 through 49.

II. ARGUMENT

A. THE BOARD SHOULD APPROVE THE SETTLEMENT AGREEMENTS

The National Labor Relations Board has a longstanding policy of encouraging the peaceful resolution of disputes. *Independent Stave*, 287 NLRB 740, 741 (1987); *The Wallace Corporation v. NLRB*, 323 U.S. 248, 253–254 (1944) ("To prevent disputes like the one here involved, the Board has from the very beginning encouraged compromises and settlements.").[4] This policy "assists the Board in effectuating the policies of the Act, both with regard to settled cases and by allowing the Agency to allocate its limited resources" to other disputes, and encourages settlement at all stages of litigation. *UPMC*, 365 NLRB No. 153, at *3 (2017); *See* NLRB Casehandling Manual (Part One) Sec. 10126.3 ("Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens.").

Section 10(a) of the Act gives the Board "exclusive power to deal with unfair labor practices and to prescribe the appropriate remedy." *Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958). The Board has traditionally considered a number of factors in reviewing settlement agreements to ensure they advance the policies of the Act, including "the risks involved in protracted litigation which may be lost in whole or in part, the early restoration of industrial harmony by making concessions,

[4] The Board is statutorily required to consider settlement offers. 5 U.S.C. § 554(c)(1); NLRB Casehandling Manual (Part One) Sec. 10124.1 ("Moreover, the Administrative Procedure Act (Sec. 5(b)) requires that the Agency consider 'offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit.' (5 U.S.C. § 554(c)(1)).") The Board's policy is consistent with judicial policy throughout the courts that favors settlement. See, e.g., *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." (citing Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)); *Hensley v. Alcon Labs., Inc.*, 277 F.3d 535, 540 (4th Cir. 2002) (recognizing the value settlements generally bring by "providing an orderly and peaceful resolution of controversies"); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990) ("A strong public policy favors agreements, and courts should approach them with a presumption in their favor."); *Birbalas v. Cuneo Printing Indus., Inc.*, 140 F.2d 826, 828 (7th Cir. 1944) ("[I]t has long been public policy to favor settlement of controversies, as conducive to termination of litigation." (citing Chi., Milwaukee & St. Paul Ry. Co. v. Clark, 178 U.S. 353 (1900).

and the conservation of the Board's resources." *Farmers Co-operative Gin Assn.*, 168 NLRB 367, 367 (1967). The Board's policy of favoring settlements recognizes the risk, inherent in any litigation, that the General Counsel may not succeed in establishing every violation alleged in a complaint. *UMPC*, 365 NLRB No. 153, at *3, citing *Independent Stave Co.*, 287 NLRB at 742.

In determining whether to approve settlement agreements, "the Board has broad discretion, and the Board has regularly approved settlement agreements that provide remedies less than would be awarded if the General Counsel were to prevail on every allegation of the complaint." *UPMC*, 365 NLRB No. 153, at *3.[5] "In *Independent Stave*, the Board reiterated its longstanding, multifactored approach to determining whether a settlement agreement is appropriate . . . in part to correct what it viewed as a shift in Board law that overemphasized one factor at the expense of others: whether the proposed settlement 'substantially remedied' all alleged violations.'"[6] *Id.*, quoting *Independent Stave*, 287 NLRB at 742. "In *Independent Stave* the Board made clear that the 'substantial remedy' factor was not to predominate over other factors." *Id.* "Instead, the Board stated, it would 'evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement.'" *Id.*, quoting *Independent Stave*, 287 NLRB at 743. Thus a settlement agreement need not provide the "full remedy" that might be awarded in order to warrant approval under *Independent Stave*.

[5] See e.g. *Roselle Shoe Corp.*, 135 NLRB 472, 474-48 (1962), enfd. 315 F.2d 41 (D.C. Cir. 1963)(weighing uncertainties of litigation, Board approved settlement providing only $12,000 of the $80,000 in backpay that union claimed was owed); *McKenzie-Williamette Medical Center*, 362 NLRB No. 20, slip op. at 56 (2015)(Well established that approval of settlements under *Independent Stave* does not require that the remedies provided by settlement be coextensive with the remedies available if General Counsel were to prevail on all allegations of complaint); *UPMC* at 6 ("The Board did not say it would *only* approve consent settlement agreements that provide a full remedy. Nor can a 'full remedy' standard be inferred from the *General Electric* decision. Merely because the Board in *General Electric* approved a consent settlement agreement that provided a full remedy, it does not follow that it would have *rejected* a consent settlement agreement that provided less than a full remedy").

[6] In *Independent Stave*, the Board criticized the "too narrow" focus on whether the settlement provided a full remedy because it was based on the "faulty presumption" that the General Counsel would prevail on every alleged violation in the complaint. *Independent Stave*, above, at 742.

The Settlement Agreements submitted for approval were negotiated in a process open to all parties with the good faith intent to resolve this protracted and contentious litigation, and would at long last end this litigation if approved. The Settlement Agreements were approved by the General Counsel, the Respondents and, the alleged 8(a)(3) discriminatees. The Settlement Agreements take into account the purposes of the Act and the aim of remedying alleged unfair labor practices, the extraordinarily lengthy history and trial of this case, the risks inherent in litigating this case through adjudication by the ALJ, appeal to the Board, and appeals to the federal courts, and the costs to the Agency and all parties of continued litigation. The Settlement Agreements achieve a result that effectuates the purposes of the Act and should be approved by the Board.

B. APPROVAL OF THE SETTLEMENT AGREEMENT IS WARRANTED UNDER *INDEPENDENT STAVE*

We stress that the following abbreviated discussion of the *Independent Stave* analysis is intended only to supplement the arguments raised by McDonald's USA, LLC in its appeal without undue duplication.

1. The Settlement Agreement is Reasonable Because it Provides the Full Remedies Available Under the Act and Avoids the Risks and Delay of Continued Litigation.

The second *Independent Stave* Factor, the reasonableness of the settlement, weighs in favor of approval of the proposed Settlement Agreement. The Board in *Independent Stave* instructed that it must be determined "whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation." *Independent Stave*, 287 NLRB at 743. Although a settlement agreement need not provide the full relief available under the

Act to satisfy the reasonableness standard [7], the Settlement Agreements submitted for approval in this case do, in fact, provide the full remedies that would be available under the Act if the General Counsel were to prevail at trial in this matter.

i. The Settlement Agreement Provides The Full Remedies Available Under the Act and Secures Full Performance.

The Board's typical remedies for 8(a)(1) and 8(a)(3) violations are cease and desist orders, notice postings, backpay and reinstatement [8] (or waiver thereof). The Settlement Agreements presented in this case provide for cessation of the alleged unlawful conduct.[9] The Settlement Agreements provide for payment to the alleged discriminatees of the full amount of backpay as determined by the General Counsel (backpay plus excess tax and interest), which amount has already been fully funded via bank cashier's check placed in the possession of the applicable Regional Directors.[10] The Settlement Agreements require the posting of comprehensive Board notices in the subject restaurants covering each of the violations alleged in the Complaints, and the mailing of those same notices to all former employees who worked at the subject franchisee

[7] *McKenzie-Williamette Medical Center*, 362 NLRB No. 20, slip op. at 56 (2015)(Well established that approval of settlements under *Independent Stave* does not require that the remedies provided by settlement be coextensive with the remedies available if General Counsel were to prevail on all allegations of complaint); *UPMC* at 6 ("The Board did not say it would *only* approve consent settlement agreements that provide a full remedy. Nor can a 'full remedy' standard be inferred from the *General Electric* decision. Merely because the Board in *General Electric* approved a consent settlement agreement that provided a full remedy, it does not follow that it would have *rejected* a consent settlement agreement that provided less than a full remedy).

[8] See NLRA Sec. 10(c).(providing for remedies including cease and desist orders, reinstatement and backpay); Casehandling Manual (Part Three) Sec. 10512.1, 10514, 10516, 10518, 10530.1 (providing for remedies of cease and desist orders, remedial notices, reinstatement and backpay).

[9] The Settlement Agreement requires Jo-Dan MadAlisse to comply with every aspect of the notice, which covers every violation alleged in the Complaint, and to update its policies and practices that were alleged to have violated the Act. Jo-Dan MadAlisse has already implemented new policies and practices to ensure its compliance with the Settlement Agreement.

[10] Although Jo-Dan MadAlisse disagrees the General Counsel's determination of the amount of backpay, the agreed payment to Mr. Caldwell reflects a compromise on the part of Jo-Dan MadAlisse, accepting the General Counsel's backpay calculation in the interest of reaching a settlement.

restaurants during the pertinent time.[11] The alleged 8(a)(3) discriminatees elected to accept a payment of front pay in lieu of reinstatement.[12] Finally, the Settlement Agreements provides for the creation of a Settlement Fund, also fully funded via cashier's check already in the custody of Counsel for the General Counsel, to remedy potential future alleged violations of the Settlement Agreements warranting monetary relief as set forth therein.

In addition to financial performance of the Settlement Agreements being guaranteed due to delivery of the funds to the Regional Directors and counsel for the General Counsel at the time of execution, performance of the Settlement Agreements is secured by a default judgment procedure. This procedure provides the Agency with the ability to promptly enforce the Settlement Agreements and obtain appropriate relief in the event of a violation of the Settlement Agreements. Since the Settlement Agreements provide for the full remediation of all alleged unfair labor practices, secures full performance, and provide for robust enforcement procedures, the settlement is reasonable in light of the violations alleged. Any contention that the consequences of a breach of the Settlement Agreements are insufficiently serious to guaranty performance fails to take into account the genuine interests of the parties in bringing an end to this lengthy and costly litigation, and the severely compromised position of a Respondent who is subject to a default judgment.

[11] In the case of Jo-Dan MadAlisse, the General Counsel required that these notices be sent to former employees who worked at the subject restaurant between March 21 and July 31, 2014.

[12] Although Respondent's counsel never engaged in any settlement discussions with Mr. Caldwell directly, counsel for the General Counsel expressed during the negotiations some concerns about Mr. Caldwell's ability to perform the functions of his job due to an injury he had sustained while engaging in "remunerative" activities. It is unknown to this Respondent what factors Mr. Caldwell considered in deciding to waive reinstatement, however, there is no contention and no evidence that he did not waive reinstatement knowingly and voluntarily. This front pay amount exceeds one year of wages for Mr. Caldwell if he were to be reinstated.

ii. The Risks and Costs of Continued Litigation Are Not Justified.

Continued litigation means this case is far from over. Rejection of the proposed Settlement Agreements would result in the resumption of trial, post-trial briefing[13], the issuance of a decision by the ALJ, and the likely appeal of that decision to both the Board and the federal courts over a period of many years. In addition, there is the risk that the General Counsel will not prevail on some or all of the charges, and that the remedies awarded could be less than the full remedies provided under the Settlement Agreements. Accordingly, the Settlement Agreements are reasonable in light of the risks of the litigation and the stage of the litigation.

A joint employer finding is not at all a foregone conclusion in this case. While a full briefing of the evidence presented at trial will not be undertaken here, the allegation that McDonald's USA was a joint employer is forcefully contested and unresolved, and it is this Respondent's contention that the evidence adduced at trial would not support such a finding, especially as to the employees of Jo-Dan MadAlisse.

The Board's joint employer standard is also currently subject to review before both the Board and the D.C. Circuit, [14] and it is quite possible that even before this Court were to issue a decision, the Board's joint employer standard could change again.[15] As a result, continuing the litigation offers little likelihood of achieving anything of value in terms of the objectives of the Agency in furthering the goals of the Act.

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[13] The General Counsel has already requested 6 months for post trial briefing.

[14] *Hy-Brand*, Case Nos. 25-CA-163189 et al, Respondents' Motion For Reconsideration Of The Board's Order Vacating Decision And Order (March 9, 2018); *Browning-Ferris Industries of California, Inc. v. NLRB*, Case No. 16-1028, Document No. 1725628 (D.C. Circuit April 6, 2018).

[15] In addition to other joint employment cases pending, the Board is presently "considering rulemaking to address the standard for determining joint-employer status under the NLRA." *See* https://www.nlrb.gov/news-outreach/news-story/nlrb- considering-rulemaking-address-joint-employer-standard (last visited August 13, 2018). As such, there is a substantial risk that even if there were a joint employer finding in this case, the finding is unlikely to have precedential value.

Aside from the overarching joint employer issue, Jo-Dan MadAlisse continues to dispute the unfair labor practices alleged in the Complaint. As to the single 8(a)(3) charge, Mr. Caldwell, the alleged 8(a)(3) discriminatee acknowledged at trial his lengthy history of tardiness and absenteeism, and Jo-Dan MadAlisse has proffered evidence of its legitimate non-discriminatory reasons for his termination.[16] The risk that the General Counsel will not prevail on its claim of an 8(a)(3) violation is substantial, and, if so, Mr. Caldwell would not be entitled to any backpay award. Even if the General Counsel were to prevail on the 8(a)(3) charge, there is a significant dispute regarding the amount of back pay to which Mr. Caldwell would be entitled.[17] If this settlement is not approved, litigation of this issue could result in Mr. Caldwell receiving a substantially smaller backpay award.

iii. The ALJ's analysis of the Second *Independent Stave* factor is flawed on its face.

In the Order Denying Motions to Approve Settlement Agreements, the ALJ recited the requirement under *Independent Stave* to evaluate "whether the settlement is reasonable in light of the nature of the alleged violations, the inherent risks of litigation and the stage of the litigation" (Order at p. 20). The ALJ's reasons for finding that the Settlement Agreements were not reasonable however did not address any of these factors. The ALJ's conclusion that the Settlement Agreements were not reasonable was based upon the following finding:

> "Here I find that the circumscribed involvement of McDonald's in the informal Settlement Agreements' remedies does not begin to approximate the remedial effect of a finding of joint employer status. Furthermore, given the history of this case and the propensity for additional litigation, the form of the Settlement Agreements is simply inadequate. The complexity of the Settlement Agreements'

[16] (Tr. 16479-16511; See generally Tr. at 16466:7-16511:13).

[17] Approximately 76% of the backpay figure is disputed because Mr. Caldwell sustained an injury while engaged in supplemental remunerative activities over and above his interim employment, despite the fact that he was earning more than he had earned while working for Jo-Dan MadAlisse. See *American Mfg. Co. of Texas*, 167 NLRB 520 (1967); *Grossvenor Orlando Associates, Ltd.,* 350 NLRB 1197 (2007).

> enforcement provisions and the parties' conflicting interpretations indicate that even if a mutual understanding exists between them the proposed settlements will likely engender further proceedings, as opposed to finally resolving this matter. In addition, while the Consolidated Complaint does not allege McDonald's committed unfair labor practices, General Counsel has adduced a significant quantum of evidence in support of the theory that McDonald's and the Franchisee Respondents engaged in a coordinated effort to effectuate a "mutual interest in warding off union representation" of employees at the Franchisee Respondent locations.[citations omitted]. Finally, given the stage and posture of this particular litigation, the Settlement Agreements are not a reasonable counterpoint to the risks of completing the record and subsequent proceedings."

(Order at p. 20).

We will address each one of these proffered reasons seriatim.

The first proffered reason why the Settlement Agreements do not meet the reasonableness standard of *Independent Stave* is that "the circumscribed involvement of McDonald's in the informal Settlement Agreements' remedies does not begin to approximate the remedial effect of a finding of joint employer status." This reason does not address the question of whether the settlement is reasonable light of "the nature of the alleged violations, the inherent risks of litigation and the stage of the litigation." The settlement is reasonable because it provides a reasonable remedy – in this case, a full remedy for the alleged violations. The involvement of McDonald's in implementing the remedies at the franchisee restaurants has no bearing on whether the settlement is reasonable, especially where the monetary remedies have been fully funded, and any other performance is secured by a strict default judgment procedure. The ALJ went on to discuss the fact that "[h]ad General Counsel established that McDonald's was a joint employer with the Respondent Franchisees, McDonald's would have been 'jointly and severally responsible for remedying' any unfair labor practices the Respondent Franchisees committed," (Order at p. 22), but joint employer status, even if established, is not a "violation" within the meaning of the Act or under *Independent Stave* and it also is not itself a remedy. Furthermore, if, as in this case, the full financial remedies

have been tendered, the potential importance of a jointly and severally liable party is at the very least vastly diminished, if it has any value at all.

The second proffered reason why the Settlement Agreements do not meet the reasonableness standard of *Independent Stave* is that "given the history of this case and the propensity for additional litigation, the form of the Settlement Agreements is simply inadequate. The complexity of the Settlement Agreements' enforcement provisions and the parties' conflicting interpretations indicate that even if a mutual understanding exists between them the proposed settlements will likely engender further proceedings, as opposed to finally resolving this matter." This reason also fails to address the standard set out in *Independent Stave* where the Board required that reasonableness of a settlement agreement was to be evaluated in light of "the nature of the alleged violations, the inherent risks of litigation and the stage of the litigation." While it might be argued that the alleged propensity for additional litigation has a connection to the "risks of litigation," we submit that this element of the standard is intended to apply to the risks of continuing the present trial, not the risk of a breakdown of a settlement where the parties have expended significant effort to reach an agreement with the express intention of ending the litigation. As for the alleged complexity of the Settlement Agreements, a simple examination of the Agreements shows that this conclusion is unwarranted. There is nothing extraordinary or complex about the Settlement Agreements, and even though reasonable persons may have differing opinions about what constitutes a "complex" agreement, given the challenges of this litigation, the difficulty of reaching a resolution, and the sophistication of the parties (all respondents are represented by counsel), some degree of complexity is no reason to reject the Settlement Agreements.

The third proffered reason why the Settlement Agreements do not meet the reasonableness standard of *Independent Stave* is that "while the Consolidated Complaint does not allege McDonald's committed unfair labor practices, General Counsel has adduced a significant quantum

of evidence in support of the theory that McDonald's and the Franchisee Respondents engaged in a coordinated effort to effectuate a 'mutual interest in warding off union representation' of employees at the Franchisee Respondent locations." Once again, this reason has nothing to do with the standard set out in *Independent Stave* where the Board required that reasonableness of a settlement agreement was to be evaluated in light of "the nature of the alleged violations, the inherent risks of litigation and the stage of the litigation." While the ALJ might have wanted the General Counsel to have issued complaints alleging substantive ULP claims against McDonald's USA, the General Counsel did not do so. Accordingly, the ALJ's contentions concerning the evidence adduced regarding McDonald's (which is disputed), do not comprise the "alleged violations" that are germane to the *Independent Stave* analysis.

Finally, the fourth proffered reason why the Settlement Agreements do not meet the reasonableness standard of *Independent Stave* is that "given the stage and posture of this particular litigation, the Settlement Agreements are not a reasonable counterpoint to the risks of completing the record and subsequent proceedings." In her discussion of the risks and stage of the litigation, the ALJ focuses on whether the approval of the Settlement Agreements would "conserve the significant agency resources *expended* over the course of three years to create a record on the joint employer issue." (Order at p. 37 (emphasis added)). The ALJ thus reasons that the work involved in "exceptions and appeals" would, in her judgment, be "less onerous and demand fewer resources than the lengthy, arduous trial presentation necessary to create the record thus far." (Order at p. 37). This rational misses the mark. The issue is the risk associated with the continued litigation measured at this stage of the litigation, not the sunk costs of the litigation incurred to date. By this rational, no litigation could be justifiably settled by the General Counsel for anything short of a full

"win" at or near the end of a trial. Board law simply does not support the ALJ's conclusion.[18] As discussed above, this case is nowhere near its conclusion, and its outcome is far from certain. The fact that the sunk costs invested in this litigation are substantial, for all parties, is no reason to reject the Settlement Agreements under *Independent Stave*.

For the foregoing reasons as well as the reasons set forth in the Appeal submitted by McDonald's USA, LLC, the Settlement Agreements are reasonable in light of the nature of the violations alleged, the risks inherent in the litigation, and the stage of the litigation. Thus, the second *Independent Stave* factor is satisfied.

III. CONCLUSION

For the foregoing reasons as well as the reasons set forth in the Appeal submitted by McDonald's USA, LLC, the Settlement Agreements should be approved.

Respectfully Submitted

Dated: August 24, 2018

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[18] See *UPMC*, 365 NLRB No. 153, at *3 (2017)(Board policy encourages settlement at all stages of litigation); NLRB Casehandling Manual (Part One) Sec. 10126.3 ("Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens.").

CERTIFICATE OF SERVICE

I, Joseph A. Hirsch, hereby certify that on August 24, 2018, a true and correct copy of the foregoing **BRIEF OF PHILADELPHIA RESPONDENT IN SUPPORT OF SPECIAL APPEAL OF MCDONALD'S USA, LLC FROM ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTIONS TO APPROVE SETTLEMENT AGREEEMENTS** was electronically filed with the office of the Executive Secretary of the National Labor Relations Board and served on the same date via electronic mail at the following addresses:

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